Joseph Smith is a 69-year-old retired landscape architect whose health has been deteriorating over the past five years. He has end stage renal failure, diabetes, congestive heart failure, sleep apnea, and a host of other progressive diseases that have left him physically debilitated. He requires dialysis three days a week, relies on a wheelchair, and has also been diagnosed with mild cognitive impairment. He and his second wife, a physical therapist, have accumulated several pieces of property in California over their 27-year marriage, and, due to Mr. Smith’s declining health, they decided to update their respective wills. Mr. Smith’s first wife left him 40 years ago, taking their infant son and moving to the Midwest. Due to the contentious nature of their subsequent divorce, she refused to allow him to see their son and the two eventually lost contact. Mr. Smith did not pay child support or attempt to contact the child. The son recently found his father through another relative and they have begun a relationship that Mr. Smith describes as “uncomfortable” due to the son’s understandable anger over feeling abandoned by his father. Although Mr. Smith decided to include his son in his will, along with the two stepchildren he raised, his son recently asked for an accounting of all of the property and money in his father’s estate. Mr. and Mrs. Smith are concerned that the son may challenge his father’s will as he has made several remarks about Mr. Smith’s poor health and cognitive deficits. The Smiths’ lawyer recommended a neuropsychological evaluation to prove Mr. Smith had testamentary capacity at the time his will was amended.

Testamentary Capacity

The freedom to leave your own property to whomever you please is a right that is highly valued in our society. Unfortunately, as the Baby Boomers age and their wealth is transferred from one generation to the next, lawsuits challenging the validity of new or amended wills will become more common (Shulman, Cohen, & Hull, 2004). Testamentary capacity is the most frequently litigated type of capacity (American Bar Association/American Psychological Association, 2008). Challenges to a will may come about for several reasons, such as complex family dynamics or because the testator (author of the will) suffered from a brain disease such as Alzheimer’s, a delusional disorder, alcohol abuse, or other neurological or psychological illness. The most common reasons for contesting a will are based on a lack of testamentary capacity by the author at the time of the execution of the will or a claim of undue influence.

Capacity is a legal term that refers to a person’s ability to perform a specific act, such as making medical decision, managing finances, or driving. Testamentary capacity is used to describe a person’s ability to make a legal will (Black’s Law Dictionary, 2004). Capacity is situation specific. That is, a person may lack the capacity to drive a car, but still maintain the capacity to live independently or make his or her own medical decisions. Incapacity in one domain does not automatically mean incapacity in other domains of functioning.

Signs that may suggest incapacity include short-term memory loss, comprehension problems, difficulty with simple math, delusions, hallucinations, disorientation, problems with the expression or comprehension of language, or poor hygiene or grooming.
Undue Influence

Undue influence is a concept that can be difficult to assess. This doctrine refers to a person using power over another, often for the purpose of financial exploitation (American Bar Association, 2008). Making a case for undue influence requires two elements: the relationship between the testator and the person accused of undue influence must be based on trust and the influence over the testator must be intentional. Often, a person who is being subjected to undue influence will be kept isolated by the perpetrator so as to avoid arousing suspicion in family members, physicians, or other professionals. The victim usually feels a sense of dependence on the perpetrator and feels powerless to stop the exploitation. As Spar and Garb note, “... the testator’s mind must be subjected to that of another, the testator’s free agency destroyed, or the testator’s volition overpowered by another” (Spar & Garb, 1992, p. 170).

California Law

In the state of California, a person must be over the age of 18 and of “sound mind” in order to execute a valid will and the testator is presumed competent and can leave their property to whomever they please. However, a person is not considered competent to make a will if, at the time the will is executed or changed, he or she:

• Does not have the ability to understand the nature of a will or the fact that they are making or changing a will;
• Does not understand or remember the nature of his or her personal property;
• Cannot recall his or her relationship to family members and other people whose interests may be affected by the will (“the objects of one’s bounty”).
• Cannot organize a viable plan for the distribution of his or her property

The person making or changing a will does not have to know the value of their estate down to the last penny but they do need to have some understanding of the property and/or monies they will be bequeathing (Melton, Petrila, Poythress, & Slobogin, 1997).

A person may also lack testamentary capacity if they suffer from a brain disorder that prevents them from understanding that they are giving their property away after death and to whom they are making the bequest. However, being diagnosed with dementia or other brain disease does not automatically mean the person lacks testamentary capacity even if they lack the capacity to do other things, such as make financial decisions, drive, or make medical decisions on their own.

Testamentary capacity is specific to the act of making or amending a will and a person need only have capacity at the time the will was executed or changed. This means that a person who suffers from dementia or a delusional disorder has the right to make or change a will during periods of lucidity. Courts have a low threshold for testamentary capacity and tend to uphold a person’s right to determine who will benefit from the transfer or wealth after death (Melton et al, 1997).

Cognitive Functioning

Being “of sound mind” means “having an understanding of one’s actions and reasonable knowledge of one’s family, possessions and surroundings” (Hill & Hill, 2010). Making a valid will requires in-
tact cognitive abilities specific to each criterion required by the State of California. Unfortunately there is no specific test or battery of tests designed to measure “sound mind,” so the clinician who receives a referral for an evaluation of testamentary capacity has to be creative in their approach to the assessment process.

**Putting the Pieces Together**

APA has published *Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists*, which is available online at www.apa.org/pi/aging/programs/assessment/index.aspx. The authors delineate the cognitive skills required to satisfy the criterion of “sound mind.” However, they also note a lack of empirical evidence for the domains listed below.

**Understanding the Nature of a Will**

To satisfy this criterion, a person must have intact semantic memory or memory for words and their meaning. They should be able to give a simple definition of the words will, death, property, and inheritance. They also need to be able to express their understanding of these concepts to the evaluator, either verbally or in written form. This requires intact verbal comprehension and some ability for verbal abstraction (i.e. “What will the consequences be if you leave your oldest child out of your will?”) and can be evaluated by asking the testator direct questions.

**Knowing the Nature and Extent of Property**

A person making a will must be able to remember what property they are bequeathing and to whom. This requires intact semantic memory and the ability to convey an understanding of the extent and value of the property to the evaluator. This requires both short- and long-term memory skills as well as the ability to estimate the value of the property. According to Marson (2004), this may also depend on intact executive functions.

**Knowing the Objects of One’s Bounty**

This means the person making or amending a will must know family members and/or friends that will be his or her beneficiaries. In the later stages of Alzheimer’s and other dementias, a person may be unable to remember or even recognize family members.

**Planning for the Distribution of One’s Property**

Distributing property after death requires all of the cognitive abilities listed so far with an emphasis on executive functions, which allow a person to organize their property and plan for its dispensation.

**Emotional and Psychiatric Status**

Being of sound mind also suggests that a person is free of delusions and/or hallucinations that might otherwise interfere with good judgment. The legal term “insane delusion” refers to a false notion of reality that is held by the testator despite solid evidence to the contrary (Black’s Legal Dictionary, 2004).

**Mr. Smith and Testamentary Capacity**

The evaluation of Mr. Smith took place over several sessions due to his frailty and his dialysis schedule. Although he did have some mild deficits in short term memory and processing speed, he was able to meet the standards outlined in this article. His son may never challenge the will, but if he does, the clinical interview along with the results of Mr. Smith’s neuropsychological evaluation will prob-
ably convince a judge that he was of sound mind at the time his will was amended.

References


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